IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 245.

HENRY CLEWS ET AL.,
vs.
MALCOLM M. JAMIESON ET AL.

Certiorari to Circuit Court of Appeals, Seventh Circuit

Reply Brief of Petitioners to Brief of Respondents, Jamieson & Company.

MAY IT PLEASE THE COURT:

The brief of counsel for respondents, Jamieson & Company, is noteworthy in several respects:

First. Counsel refuse to discuss the question of gambling. They manifest a willingness, not to say anxiety, to eliminate this question from the case.

"We therefore point out to the court as a sort of summing up of our propositions," say they (p. 79) "that our position, and that of our clients, maintains the legality of the transactions on the exchange."

Whatever be the motive for this "position"—whether fear of expulsion from the Exchange should such position be maintained, or because the doctrine would invalidate

transactions in which these brokers are otherwise interested, or because the authorities on the subject are too plain to admit of argument—whatever the motive we sincerely hope that your Honors will not attribute their concession to a tacit collusion between the parties not to raise the point, nor to that *pseudo*-chivalry which is popularly supposed to obtain among blacklegs and gamblers; as, we have reason to know, was the mistaken suspicion of the Court of Appeals.

The question of gambling is in the case, because the Court of Appeals put it there, and made it the sole ground of its decision. If the vice of gambling is made to depend upon an agreement or understanding of the parties not to deliver but to settle differences, collateral to the ostensible contract to buy or sell, or, rather, which is *part and substance of that very contract*, then we maintain that the daily mutations of the contract through the Stock Exchange Clearing House is proof positive that no such illegal agreement or understanding existed. It is incredible that the unknown principals in these daily substitutions could have *agreed* to settle according to differences in price. On the other hand, if a perfectly legal contract to buy or sell is, by the manipulations of the Stock Exchange, *necessarily* converted into an illegal and gambling contract, regardless of the intentions of the real parties in interest, we want to know it. If the Stock Exchange itself has no possible *motive* to invalidate such a contract; if the real parties to it never *intended* such a result; if the manipulations, however difficult to follow, are for the accommodation and convenience of the Stock Exchange as an institution, involving no risk, nor possibility of gain or loss to the parties, why should such course of dealing be held contrary to good morals?

Second. It is not pretended that the transaction, out of

which rose this controversy, was at all unusual in any of its phases, up to the point of closing the Exchange, August 4, 1896; and it is conceded, therefore, that the sale launched upon the Chicago Stock Exchange by the complainants in July, 1896, resulted naturally, and in the ordinary course of events, in the contract of August 3d here sued upon. In other words, that every contract "for the account," that is to say, for future delivery, must, if made upon the Chicago Stock Exchange, inevitably go through similar transmutations.

Third. But it is argued that such transmutations, *even if assented to*, result in destroying, *in every instance*, all privity of contract between the undisclosed principals of the members of the Exchange and the other contracting member, so that no one not a member of the Exchange can call any of its members to account in a court of law or equity.

Fourth. It is insisted, however, that the *rules of the Exchange* have provided a speedy and adequate means for the redress of such unfortunates, and that if the petitioners had only awaited indefinitely the opening of the Exchange, they, *through their brokers, Schwartz, Dupee & Company*, could have obtained full satisfaction of their claim against Jamieson & Company at the price current; the corollary being that if the Exchange had never re-opened the petitioners would have no redress except against their particular brokers; the further corollary being that had they employed such brokers "without recourse" they would have no redress whatever.

From these postulates it would seem to follow that we have here an institution, namely, the Stock Exchange, quite as important in its commercial relationships as the banks or railroads, which is perfectly legal in all its dealings, but so extraordinary in its composition, constituents, modes, methods, rules and practices, that it is a law unto itself,

and that all who enter its portals must leave behind hope of rescue by the courts.

This case has proceeded upon the theory that the methods of the Stock Exchange *are* legal; that those who consent to deal with it do not thereupon surrender their citizenship or submit themselves to a foreign sovereignty; and that if the Stock Exchange itself can prescribe an adequate remedy for wrongs inflicted by its members (if the person aggrieved will only await its motion), a court of equity will somehow manage to evolve an equally adequate remedy "without the aid or consent of any other nation."

The Deadly Parallel.

We will not complain that counsel for respondents, Jamieson & Company, have attempted to substitute for the undisputed facts in the case a written stipulation relating to what we conceive to be an altogether collateral point, further than to remark that if the inference sought to be drawn from the stipulation was warranted it would be a mere *conclusion* of counsel for petitioners, drawn from facts which *in themselves*, do not justify such a conclusion. But counsel absolutely pervert the meaning of the stipulation; not by misquotations, to be sure, but by italicizing certain words which the stipulation itself takes pains to qualify. On pages 8 and 9 of their brief we have the stipulation set forth as follows:

"That the transactions heretofore set out in this stipulation of purchase and sale by Schwartz, Dupee & Co., Jamieson & Co., and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, *and those transactions, so far as the different principals are concerned, were not settled or canceled by* any of the substitutions, nor by any of *the settlements between the brokers*, except so

far as where one client or principal of a broker was, through such broker, both a purchaser, and a seller. In other words, the settlements by substitutions or otherwise through the clearing house *were merely settlements between the members of the Stock Exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves*, except where the same broker had both purchased and sold for the same client."

Without calling in the aid of the "deadly parallel," we ask your honors to read the same words with the stress laid where we think it properly belongs:

"That the transactions heretofore set out in this stipulation of purchase and sale by Schwartz, Dupee & Co., Jamieson & Co., and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, and those transactions, so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, *except so far as where one client or principal of a broker was, through such broker, both a purchaser and a seller.* In other words, the settlements by substitutions or otherwise through the clearing house were merely settlements between the members of the Stock Exchange, and were not settlements or cancellations of the contracts *between the principals* (whom the brokers represented) *and the brokers themselves, except where the same broker had both purchased and sold for the same client.*"

As to the terms of the contract between the principal and his broker (which alone the stipulation purports to cover), see our principal brief, pp. 62 and 63; but the precise meaning and application of the stipulation will become more apparent on analysis of the transactions to which it refers.

Before entering upon this explanation we wish to call attention to a very obvious, but seemingly anomalous, result inherent in the clearing house principle. Let us assume that on the first day of August, 1896, Schwartz, Dupee & Company, sell on the Chicago Stock Exchange 700 shares

Diamond Match stock for client A, and the sale is made to broker X. At the close of the Exchange, Schwartz, Dupee & Company would be handed by the manager of the Exchange a card in which there has been substituted the purchaser Y. Here on the very day of sale, it will be observed, there has been a novation. Schwartz, Dupee & Company are 700 shares "short" in the clearing house, and their client A has presumably paid them $7,000 which they have deposited with the Exchange as a trust fund. On the day following, however, Schwartz, Dupee & Company *buy* 700 shares of Diamond Match stock through the clearing house for client B., who has presumably paid to them $7,000 as security for the performance of their contract. But at the close of the Exchange on that particular day the manager of the clearing house finds that Schwartz, Dupee & Company have sold in the clearing house 700 shares of Diamond Match stock and have purchased in the clearing house a like number of shares, *which balances their account*, consequently, so far as the books of the clearing house are concerned, it would not appear that Schwartz, Dupee & Company had *any transaction whatever* on that day. Nevertheless the fact would remain that Schwartz, Dupee & Company had a client, A, for whom they had sold 700 shares and a client B for whom they had purchased 700 shares, and they would, therefore, have a buyer and purchaser whom they would be prepared at any time to bring together. In other words the broker under such circumstances becomes *quoad hoc* himself a clearing house. Now, if on the day next succeeding August 3, we will say, client B orders Schwartz, Dupee & Company to close out his deal, that is to say, to *sell* 700 shares of Diamond Match stock for the account, *which the day previous he had ordered purchased*,

Schwartz, Dupee & Company would *again be brought into the clearing house*, and their balance would again be 700 shares *sold* and the 700 shares would inevitably be the 700 shares of A. In other words, the purchaser of A's shares, instead of being X or Y of August 1 or B of August 2, would be the purchaser of August 3, as designated by the manager of the clearing house.

Now, taking up the schedule of the various transactions for the August account, found on page 77 of the record, it appears that on July 25th, Schwartz, Dupee & Company sold to various brokers 500 shares of Diamond Match stock at $229 per share. On that day Schwartz, Dupee & Company bought no stock on the Exchange for the August account. (N. B. Please to observe that in the schedule we are referring to there is a July account and an August account which are not to be confused.)

Turn then to page 80 of the record, where there is found a schedule of the transactions of Schwartz, Dupee & Company on July 27th for the August account. It there appears that for the four brokers to whom Schwartz, Dupee & Company had sold the 500 shares on July 25th, there were substituted two brokers. Schwartz, Dupee & Company in addition to this substitution of the previous 500 shares also made original purchases and sales for the August account. They sold 350 shares to Mr. Peters at $229 per share, and they also bought 350 shares from Mr. Peters at the same figure. The 350 shares sold were for two clients of Schwartz, Dupee & Co. One of these clients was the complainants to the extent of 200 shares. The other 150 shares were for some other client of Schwartz, Dupee & Co. The 350 shares bought on July 27th were for still another client of Schwartz, Dupee & Company, whom we will call X.

See page 89 of the record, where the stipulation provides as follows:

"That the 500 shares sold on July 25, 1896, by Schwartz, Dupee & Company, for the 'August account,' *was sold for the account of Clews & Company*, the complainants; that 200 shares of the 350 shares, sold July 27, 1896, by Schwartz, Dupee & Company, for the 'August account,' *were also sold on account of complainants;* that all of the other sales made by Schwartz, Dupee & Company, for the 'August account,' were made on behalf of other clients than the complainants."

Schwartz, Dupee & Company having bought as much as they sold, of course the total amount they were short in the clearing house at the close of business on July 27th, would not be affected by their transactions that day and they still had a balance of 500 shares sold in the clearing house.

Turn next to page 81 of the record and it appears that on July 28th, another substitution has been made for the 500 shares Schwartz, Dupee & Company had sold for the August account. On that day they also sold 750 shares of the stock for four different clients. See again stipulation page 89 of the record which provides:

"That the 750 shares sold by Schwartz, Dupee & Company, on July 28, 1896, were sold for four different clients of Schwartz, Dupee & Company; for one to the amount of 50 shares, for another to the amount of 300 shares, for another to the amount of 350 shares, and for another to the amount of 50 shares."

One of the clients was Mr. X to the extent of 350 shares; this sale balances the purchase for Mr. X of the same amount of shares on the 27th of July and he then dropped out of the account. *Schwartz, Dupee & Company had purchased and sold the same amount of stock for the same client.* One transaction balances the other and of course it was the intention thereby to close out such a client. See again page 89, where the stipulation provides:

"That the client for whom Schwartz, Dupee & Company bought the 350 shares on July 27th *is the same person* for whom they sold 350 shares on July 28th, and who sold *in order to close his purchase of July 27th.*"

The other clients in the sale of July 28th were as follows: One for 50 shares; one for 300 shares, and one for 50 shares. The balance then, which Schwartz, Dupee & Company had sold for all their clients at the close of business on July 28th, was 1250 shares.

Turn now to pages 82 and 83 of the record and we find that these 1250 shares were substituted for other contracts on July 29th, and that on the latter day Schwartz, Dupee & Company also sold 150 shares and purchased 300 shares. The 300 shares purchased were for a client whom we will call Mr. W, and who is the same client for whom Schwartz, Dupee & Company sold the 300 shares on July 28th. See again page 89, where the stipulation provides:

"That the client for whom Schwartz, Dupee & Company sold 300 shares on July 28th *is the same person* for whom Schwartz, Dupee & Company bought 300 shares on July 29th, and said purchase of July 29th was made to cover said person's sale of July 28th."

At the close of business on this day, Schwartz, Dupee & Company had sold 1,100 shares for their various clients; they had no clients who were then purchasers for the August account; they had then contracts sufficient to supply all their clients who were sellers for the August account.

Turn next to the middle of page 84 and the schedule of Schwartz, Dupee & Company's transactions for July 30th is found. It appears from this that the 1,100 shares which Schwartz, Dupee & Company had sold were carried into the clearing house for July 30th, and that substitutions of other brokers were made therefor. Schwartz, Dupee & Company on that day had neither any sales nor any purchases,

and their balance was the same as on the previous day. They had no new clients, either purchasers or sellers.

Turn next to page 85 and the schedule of Schwartz, Dupee & Company's transactions for July 31st is found. On that day other brokers were substituted for the contracts in the total amount of 1,100 shares sold, which Schwartz, Dupee & Company carried into the clearing house. There were no additional sales or purchases on said day and the balance remained the same, to wit, 1,100 shares.

Turn next to page 86 of the record and it is found that the 1,100 shares brought into the clearing house on August 1st, had appeared with still other brokers substituted therefor. On this day Schwartz, Dupee & Company sell for the August account fifty shares for another client. This added to the previous sales made a total amount of contracts of sale outstanding, 1,150 shares; and this amount would be carried into the clearing house on the next business day, to wit, August 3d.

On August 3d, the manager of the clearing house substituted Jamieson & Company as purchasers of these 1,150 shares, and the manager of the clearing house notified Schwartz, Dupee & Company of the substitution. See page 42 of the record. He also notified Jamieson & Company of this substitution. See page 42 of the record. The parties being so notified ratified the substitution by exchanging trading cards with each other. These trading cards are copied at page 44 and are identified elsewhere.

The following schedule shows all the purchases and sales made by Schwartz, Dupee & Company for the August account.

PURCHASES AND SALES FOR AUGUST ACCOUNT
By SCHWARTZ, DUPEE & Co.

Record.	*Date.*	*Bought.*	*Sold.*	*Daily balance sold.*
p. 77	July 25	none	500 for Clews	500
p. 80	" 27	350 for X.	200 for Clews	
	" 27		150 for A	500
p. 81	" 28	none	50 for B	
	" "		300 for W	
	" "		350 for X	
	" "		50 for D	1250
p. 83	" 29	300 for W.	150 for E	1100
p. 84	" 30	none	none	1100
p. 85	" 31	none	none	1100
p. 86	Aug. 1	none	50 for F	1150
		650	1800	
			650	
			Bal. sold	1150

Carrying the summary a step farther, it appears that Schwartz, Dupee & Co.'s sales for August account were as follows:

For Clews & Co.		700	
"	A	150	
"	B	50	
"	W	300	(canceled by purchase.)
"	X	350	" " ")
"	D	50	
"	E	150	
"	F	50	

Their purchases were for W 300; for X 350, canceling the sales for those persons, and leaving the only clients interested,

the complainants, together with A, B, D, E and F *in the amounts respectively shown*, being a total of 1,150 shares sold, which was carried into the clearing house on August 3d, and the manager authorized to substitute as the purchaser thereof any broker or brokers who had bought that amount. It appears from the clearing house sheet of Jamieson & Co., at p. 87, that they were purchasers of 1,150 shares, and the manager brings Schwartz, Dupee & Co. and Jamieson & Co. together as seller and purchaser and each firm is satisfied and in writing ratifies the contract thus made by their common agent.

BECKHUSON AND GIBBS V. HAMBLET.

The case of *Beckhuson and Gibbs* v. *Hamblet*, L. R. Q. B. Div., Vol. 2, p. 18, cited by counsel (Brief, p. 57), was a case at law and technically reasoned. According to the doctrine of this case if broker A says to broker B, "I have three orders for the purchase of Louisville shares; one for 100, one for 200 and one for 400—total, 700 shares; can you let me have them?"—and a bargain is struck; now, if a contract is first made for 100 shares, which broker A mentally assigns to his first client, and then immediately afterwards another contract is made for 200 shares, which broker A mentally assigns to his second client, and then still another contract is made for 400 shares, which broker A mentally assigns to his third client, there would be a privity of contract between each of the clients and broker B, upon which the client could sue as the undisclosed principal of broker A. But if the contract between the brokers is for 700 shares in a lump, which broker A apportions among his clients, there would be no privity of contract between the undisclosed principals and broker B, even if all parties

concerned had consented to a general custom sanctioning the transaction.

This strikes us as a distinction with very little difference, and as a fair specimen of the metaphysical reasoning of the old common law. But if such be the rule at *law*, it furnishes reason sufficient for a resort to *equity*, where the only inquiry is, Who is the real party in interest and fairly entitled to the fruits of the particular contract?

As a justification of our standing in equity we would respectfully add to the cases of *Phillips* v. *Edsall*, 127 Ill. 535, and *Chapman* v. *Shattuck*, 3 Gilm. (Ill.) 49, cited in our principal brief (p. 102), the case of *Beckhuson and Gibbs* v. *Hamblet*.

The Public Sale.

Counsel for respondents frequently refer to petitioner's sale of the 700 shares of Diamond Match stock at public auction as a *fictitious* sale. (See brief for respondents, Jamieson & Company, p. 71.) But this assertion is not well founded. When, on the 3d day of August, 1896, the shares of stock were tendered to Jamieson & Company by Schwartz, Dupee & Company, the title to the shares then and there, *eo instanti*, became vested in Jamieson & Company. (See our principal brief, p. 87, and authorities cited.)

When the shares of stock were offered at public auction they were offered *as the property of Jamieson & Company, and sold as such*. In conducting the sale petitioners acted as *quasi* agents of the respondents, Jamieson & Company. The relationship between them did not have the fiduciary qualities of an actual agency, but was, according to the authorities, a somewhat analogous relationship. The petitioners became the purchasers of the shares of stock at their own sale. This is the sum and total of their offending. That there

was any misconduct in *fact* is not pretended; that the sale resulted in any injury to the respondents is not pretented. On the contrary, the price bid for the stock by petitioners was the highest price offered, and therefore was of greater advantage and benefit to the respondents than would have been the case had petitioners awaited the opening of the Exchange.

The sole object of the sale was to furnish evidence of market value. The original bill in this case charged a conspiracy to "kite" the value of Diamond Match stock for the purpose of unloading on the public. It is notorious that the balloon bursted, and that the Chicago Stock Exchange was closed in consequence. The bids received at a public auction sale, duly advertised, would afford *prima facie* evidence of *actual* value, and the sole purpose of the sale, we repeat, was to provide such *evidence.*

Mr. Sedgwick, in his Work on Damages, 8th Ed., Vol. 2, Sec. 755, says:

"It is often said that where the vendor resells the property, the difference between the price obtained at the resale and the contract price is absolutely the measure of damages; or more exactly, the difference between the net proceeds of the resale (the price obtained less the expense) and the contract price. But in other cases, it is *more properly held* that the price obtained at the resale is only *evidence* of the market value."

In addition to the evidence afforded by this resale we have the bids offered for the stock on the re-opening of the Exchange, from which, it appears, that the price bid by petitioners for the stock was an adequate price and the fair value of the stock at the time. The respondents, Jamieson & Company, have made no attempt whatever to show to the contrary, nor have they attempted to set aside the sale by offering to redeem the stock at the contract price.

PETITIONERS ASSUMED IGNORANCE OF THE RULES AND CUSTOMS OF THE CHICAGO STOCK EXCHANGE.

In arguing the proposition that, to be binding, contracts must be *mutual*, and that the custom of substitutions in vogue on the Stock Exchange were not known to the petitioners, not assented to by them, and *therefore*, not being binding upon them, failed to bind the respondents, counsel have involved themselves in perplexing logic. We can understand how a *defendant*, being sued upon a contract different in terms from the one he expressly authorized, but nevertheless sought to be holden on the ground of a custom assented to, might be permitted to plead ignorance of such custom. Such was the case of *Irwin* v. *Williar*, 110 U. S. 499, cited by counsel for respondents, Jamieson & Company (See brief, pp. 48 to 51).

But we venture to affirm that nowhere in all the books can a case be found where a defendant has escaped liability on a contract, entered into by him, on the ground that the *plaintiff* was ignorant of the customs which resulted in the making of the contract. Expressed in plain words the contention of Jamieson & Company amounts to this:

"We, being members of the Chicago Stock Exchange, were perfectly familiar with all its rules, customs and regulations, and entered into the contract of August 3d in view of and with full knowledge of such rules and customs. But it is very evident that Clews & Company were not familiar with such rules and regulations, can not be presumed to have assented to them, *and therefore we are not bound!*"

And yet, almost in the next breath, counsel contend that the transaction was had on the Chicago Stock Exchange *subject* to the rules, customs and regulations of that Exchange which provided an exclusive remedy for all breaches of

contract, and that the petitioners, *having contracted with reference to such rules*, must look to such remedy.

But what evidence is there in the case that Clews & Company were ignorant of the rules and customs of the Chicago Stock Exchange, or that they did not contract with reference to such rules? By authorizing the sale upon the Exchange the law *presumes* they were acquainted with its customs. Is there any evidence to overthrow this presumption? On the contrary, every telegram passing between Clews & Company and their brokers, Schwartz, Dupee & Company, manifests the utmost familiarity with the rules and customs of the Chicago Stock Exchange, and the course of dealing in the clearing house of that institution.

We have pointed out in our principal brief that when Clews and Company ordered a sale " for the account " they must have known that the sale would take place on the Chicago Stock Exchange, and through its clearing house; *for, disassociated from the Stock Exchange, the words " for the account " have no significance whatever.* But interpreted with reference to the Stock Exchange, they are pregnant with meaning. In them are packed all the rules, usages, regulations and consuetudinary law of that institution.

Respectfully submitted,

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